Khairuddin bin Abu Hassan v Tan Sri Mohamed Apandi Ali (sued in his capacity as the appointed 'Attorney General')

HIGH COURT (KUALA LUMPUR) — APLICATION FOR JUDICIAL REVIEW NO WA-25–27–02 OF 2016
HANIPAH FARIKULLAH J
14 FEBRUARY 2017

Civil Procedure — Judicial review — Application for leave — Applicant applied for leave for judicial review challenging decisions of respondent that Prime Minister had not committed any offence and further instructed Malaysian Anti-Corruption Commission ('MACC') to close files — Whether decision of Attorney General to prosecute or not to prosecute under art 145(3) of the Federal Constitution justiciable or amenable to judicial review — Whether court had jurisdiction to grant mandamus order that Royal Commission of Inquiry be formed — Whether respondent in conflict of interest to decide whether to charge or not to charge the Prime Minister — Whether respondent's direction for MACC to close its files ultra vires art 145(3) of the Federal Constitution — Whether respondent's discretion under s 8(2) of the Malaysian Anti-Corruption Commission Act 2009 reviewable by court — Federal Constitution art 145(3) — Malaysian Anti-Corruption Commission Act 2009 ss 8(2) & 29 — Rules of Court 2012 O 53 r 3

The applicant filed the present action for leave for judicial review pursuant to O 53 r 3 of the Rules of Court 2012 challenging the decision of the respondent, the Attorney General ('AG') made on 26 January 2016 in a press release: (a) that there was no necessity for Malaysia to make a request for a mutual legal assistance from any foreign state; (b) that there was no criminal offense committed by the Prime Minister, Dato' Sri Mohd Najib bin Tun Abdul Razak in relation to three investigation papers submitted by the Malaysian Anti-Corruption Commission ('the MACC'); and (c) to close the said investigation papers. The respondent submitted that the decision of the AG not to institute criminal proceedings under art 145(3) of the Federal Constitution ('the Constitution') was non-justiciable and hence was not reviewable by the court. Further, the respondent submitted that the relief sought by the applicant for a mandamus order that a Royal Commission of Inquiry be formed and convened to inquire, deliberate and advise appropriate actions to be taken on the MACC investigation papers was not within the competent jurisdiction of the court since such power was vested only with the Yang di-Pertuan Agong. In response, the applicant submitted that the respondent being appointed as the AG by the Yang di-Pertuan Agong on the advice of the Prime Minister was in conflict of interest to decide whether to charge or not to charge the Prime Minister. The applicant further contended

that the decision of the respondent directing MACC to close its files was ultra vires the respondent's powers under art 145(3) of the Constitution. It was also submitted that the respondent had failed to apply the correct test in arriving at his decision to refuse MACC's request for mutual legal assistance as the only consideration by the respondent to exercise his discretion under s 8(2) of the Malaysian Anti-Corruption Commission Act 2009 ('the Act') was simply whether he had reasonable grounds to believe that the request by the MACC was relevant to their ongoing investigations at the material time.

Held, dismissing the applicant's application with no order as to costs:

(1) The effect and meaning of art 145(3) of the Constitution had been settled by long line of decisions of the apex courts. These courts had held that the decision of the AG to institute or not to institute criminal proceedings was not justiciable or amenable to judicial review (see para 24).

(2) Article 145(3) of the Constitution is a special provision which give only the AG the power to institute, conduct or discontinue any proceeding for an offence. Therefore, the issue of conflict of interest as contended by the applicant did not arise when the AG in the present case decided not to charge the Prime Minister (see paras 29 & 31).

(3) The instruction of NFA/KUS had nothing to do with the exercise of the AG's discretion under art 145(3) of the Constitution. It merely related to the instructions commonly minute in the investigation papers after a decision not to prosecute was made. The minute of NFA/KUS in the investigation papers did not impede the MACC to reopen investigations on new evidence. There was no encroachment on the investigation powers of the MACC under the Act. Therefore, there was no merit in the applicant's contention that the respondent's decision directing the MACC to close its files was ultra vires art 145(3) of the Constitution. There was no purpose for the court to grant leave just for the purpose of investigation on full inter parte basis as there was no arguable case in respect of the applicant's application (see paras 37, 39 & 48–49).

(4) The AG's exercise of power under s 8(2) of the Act was in the course of a criminal investigation and hence not reviewable by the court (see para 56).

(5) The discretion to set up the Commission of Enquiry is exclusively within the sphere of the Executive. The relief and the subject matter presented by the applicants with regards to the setting up of a Royal Commission involved a policy consideration by the respondents and hence non justiciable. The jurisprudence of the court was that it was not for the court to interfere in the matter because the wisdom and policy of the

government belongs to the government. The court cannot tell the public authority how to exercise its powers (see paras 62 & 64–65).

[Bahasa Malaysia summary

Pemohon telah memfailkan tindakan ini untuk memohon kebenaran semakan kehakiman menurut A 53 k 3 Kaedah-Kaedah Mahkamah 2012 mencabar keputusan pihak responden, Peguam Negara ('PN'), yang dibuat pada 26 Januari 2016 dalam sebuah sidang akhbar: (a) bahawa tidak terdapat keperluan untuk Malaysia membuat suatu permohonan bagi suatu bantuan perundangan bersama daripada mana-mana negara asing; (b) bahawa tidak terdapat kesalahan jenayah yang dilakukan oleh Perdana Menteri, Dato' Sri Mohd Najib bin Tun Abdul Razak berkenaan dengan tiga kertas siasatan yang dikemukakan oleh Suruhanjaya Pencegahan Rasuah ('SPRM'); dan (c) untuk menutup kertas siasatan. Pihak responden menghujahkan bahawa keputusan PN untuk tidak memulakan prosiding jenayah di bawah perkara 145(3) Perlembagaan Persekutuan ('Perlembagaan') tidak boleh diadili dan oleh itu tidak boleh disemak semula oleh mahkamah. Selanjutnya, pihak responden menghujahkan bahawa relif yang dipohon oleh pemohon untuk suatu perintah mandamus supaya suatu Suruhanjaya Diraja ditubuhkan dan dimulakan untuk menyiasat, menimbang teliti dan menasihatkan tindakan yang sewajarnya untuk diambil ke atas kertas siasatan SPRM bukan dalam bidang kuasa kompeten mahkamah memandangkan kuasa itu hanya terletak kepada Yang di-Pertuan Agong. Sebagai balasan, pemohon menghujahkan bahawa pihak responden yang dilantik sebagai PN oleh Yang di-Pertuan Agong atas nasihat Perdana Menteri berada dalam kedudukan percanggahan kepentingan untuk memutuskan sama ada hendak menuduh Perdana Menteri atau tidak. Pemohon selanjutnya menghujahkan bahawa keputusan responden mengarahkah SPRM untuk menutup fail mereka melampaui kuasa responden di bawah perkara 145(3) Perlembagaan. Pemohon juga menghujahkan bahawa pihak responden telah gagal untuk menggunakan ujian yang betul dalam membuat keputusan untuk menolak permohonan SPRM untuk mendapatkan bantuan perundangan bersama memandangkan pertimbangan yang dibuat oleh responden dalam melaksanakan kuasa budi bicaranya di bawah s 8(2) Akta Suruhanjaya Pencegahan Rasuah Malaysia 2009 ('Akta itu') hanyalah sama ada beliau mempunyai sebab yang munasabah untuk mempercayai bahawa permohonan oleh SPRM adalah relevan kepada siasatan yang sedang dijalankan pada masa yang material.

Diputuskan, menolak permohonan pemohon tanpa perintah tentang kos:

(1) Kesan dan makna perkara 145(3) Perlembagaan telah lama diselesaikan oleh beberapa keputusan mahkamah tertinggi. Mahkamah ini telah memutuskan bahawa keputusan PN untuk memulakan atau tidak memulakan prosiding jenayah tidak boleh diadili atau tertakluk kepada semakan kehakiman (lihat perenggan 24).

(2) Perkara 145(3) Perlembagaan ialah suatu peruntukan yang istimewa yang hanya memberikan kepada PN kuasa untuk memulakan, menjalankan atau tidak meneruskan mana-mana prosiding bagi suatu kesalahan. Oleh itu, isu tentang percanggahan kepentingan sebagaimana yang dihujahkan oleh pemohon tidak timbul apabila PN dalam kes ini memutuskan untuk tidak menuduh Perdana Menteri (lihat perenggan 29 & 31).

(3) Arahan NFA/KUS tidak mempunyai apa-apa kaitan dengan pelaksanaan kuasa budi bicara PN di bawah perkara 145(3) Perlembagaan. Ia hanya berkait dengan arahan yang biasa diminitkan dalam kertas siasatan selepas suatu keputusan untuk tidak menuduh dibuat. Minit NFA/KUS dalam kertas siasatan tidak menghalang SPRM untuk membuka semula kertas siasatan atas bukti baharu. Tidak terdapat campur tangan terhadap siasatan yang dibuat oleh SPRM di bawah Akta. Oleh itu, tidak terdapat merit dalam hujahan pemohon bahawa keputusan responden mengarahkan SPRM untuk menutup fail mereka melampaui had kuasa di bawah perkara 145(3) Perlembagaan. Tidak terdapat sebab untuk mahkamah memberikan kebenaran hanya atas alasan siasatan berasaskan inter parte memandangkan tidak terdapat kes berkenaan dengan permohonan pemohon (lihat perenggan 37, 39 & 48–49).

(4) Pelaksanaan kuasa PN di bawah s 8(2) Akta merupakan tindakan yang dibuat dalam suatu siasatan jenayah dan oleh itu tidak boleh disemak semula oleh mahkamah (lihat perenggan 56).

(5) Kuasa budi bicara untuk menubuhkan Suruhanjaya Siasatan adalah secara eksklusifnya dalam sfera Eksekutif. Relief dan hal perkara yang dibentangkan oleh pemohon berkenaan dengan penubuhan suatu Suruhanjaya Diraja melibatkan suatu pertimbangan polisi oleh responden dan oleh itu tidak boleh diadili. Jurisprudens mahkamah adalah ia bukan merupakan kuasa mahkamah untuk masuk campur dalam perkara itu kerana kebijaksanaan dan polisi kerajaan terletak pada kerajaan. Mahkamah tidak boleh mengarahkan pihak berkuasa awam bagaimana hendak melaksanakan kuasa mereka (lihat perenggan 62 & 64–65).]

Notes

For cases on application for leave, see 2(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 5950–5953.

Cases referred to

Director of Public Prosecutions v Humphrys [1976] 2 All ER 497, HL (refd)
Dr Michael Jeyakumar Devaraj v Peguam Negara Malaysia [2013] 2 MLJ 321, FC (folld)
Empayar Canggih Sdn Bhd v Ketua Pengarah Bahagian Penguatkuasa

Kementerian Perdagangan Dalam Negeri dan Hal Ehwal Pengguna [2014] MLJU 1869, FC (refd)
Government of Malaysia v Lim Kit Siang and another case [1988] 2 MLJ 12; [1988] 1 CLJ 63, SC (refd)
Johnson Tan Han Seng v PP [1977] 2 MLJ 66, FC (refd)
Karpal Singh & Anor v PP [1991] 2 MLJ 544, SC (refd)
Law Society of Singapore v Tan Guat Neo Phyllis [2008] 2 SLR 239, HC (refd)
Long bin Samat & Ors v PP [1974] 2 MLJ 152, FC (refd)
Mohd Rafizi bin Ramli v PP [2014] 3 MLJ 114, CA (refd)
Mohd Zulhazi Mohd Zulkafli v Suruhanjaya Pasukan Polis Diraja Malaysia & Anor [2015] 2 MLJ 88, CA (refd)
PP v Zainuddin & Anor [1986] 2 MLJ 100, SC (refd)
Regina v Director of Public Prosecutions, Ex parte Manning and another [2001] QB 330, QBD (not folld)
Regina v Director of Public Prosecutions, ex parte C [1995] 1 Cr App R 136, QBD (not folld)
Repco Holdings Bhd v PP [1997] 3 MLJ 681, HC (refd)
Pengarah Tanah Dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd [1979] 1 MLJ 135, FC (refd)
Suruhanjaya Sekuriti v Datuk Ishak bin Ismail [2016] 1 MLJ 733, FC (refd)
Teh Cheng Poh v PP [1979] 1 MLJ 50, PC (refd)
Tuan Hj Sarip Hamid & Anor v Patco Malaysia Bhd [1995] 2 MLJ 442; [1995] 3 CLJ 627 (folld)
WRP Asia Pacific Sdn Bhd v Tenaga Nasional Bhd [2012] 4 MLJ 296, FC (refd)

Legislation referred to

Commissions of Enquiry Act 1950 s 2
Federal Constitution arts 8(1), 145(3)
Malaysian Anti-Corruption Commission Act 2009 ss 3, 16, 29, 29(4), 50
Mutual Assistance in Criminal Matters Act 2002 ss 2, 8(2)
Police Act 1967
Rules of Court 2012 O 53 r 3(2)

Mohamed Haniff bin Khatri Abdulla (Haniff Khatri) for the applicant.
Amarjeet Singh a/l Serjit Singh (Awang Armadajaya bin Awang Mahmud with him) (Senior Federal Counsel, Attorney General's Chambers) for the respondent.

Hanipah Farikullah J:

INTRODUCTION

[1] The applicants applied for leave for judicial review pursuant to the decisions made by the Attorney General ('AG') appearing in a press release issued on 26 January 2016 ('the press release'). The decisions were made pursuant to the submission of three investigation papers by the Malaysian

Anti-Corruption Commission ('MACC') to the AG for his decision.

BRIEF FACTS

[2] The applicants contended that the MACC investigation papers relate to complaints against the Prime Minister ('PM') in respect of:

(a) RM2.6 billion that was transferred to the PM's personal accounts (first investigation paper);

(b) the government guaranteed a RM4 billion loan to SRC International by Kumpulan Wang Persaraan approved in a Cabinet meeting (second investigation paper); and

(c) monies transferred to the PM's personal accounts from the accounts of SRC International (third investigation paper).

[3] Let me first set the context of certain public statements made by the respondents upon which the applicants seek to rely. In the press release the AG stated that he had thoroughly perused the said investigation papers which contained evidence from witnesses and supporting documents and:

(a) was satisfied that the RM2.6 billion was a personal donation to the PM from the Saudi Royal family and was satisfied:

(i) that there was no evidence to show that any criminal offence had been committed in relation to the said donation; and

(ii) that since no criminal offence has been committed there was no necessity for Malaysia to make a request for a mutual legal assistance from any foreign state.

(b) that in respect of the second investigation paper that there was no evidence to show that the PM had abused his position during the Cabinet meeting which approved the government guarantee of RM4 billion in favor of SRC International; and

(c) that in respect of the third investigation paper that there was no evidence to show that the PM had committed any criminal offence.

RELIEFS

[4] The reliefs sought in the judicial review in the application read as follows:

(a) suatu perintah certiorari untuk membatalkan keputusan yang dibuat oleh Responden pada 26 January 2016 yang memutuskan bahawa tiada keperluan bagi Malaysia untuk membuat permintaan bantuan bersama dalam perkara jenayah (mutual legal assistance) kepada mana-mana negara asing serta bahawa tiada apa-apa kesalahan jenayah yang dilakukan

oleh Perdana Menteri Najib Abdul Razak ('*Najib Razak*') berkait tiga kertas siasatan oleh Suruhanjaya Pencegahan Rasuah Malaysia dengan arahan supaya ketiga-tiga kertas siasatan tersebut ditutup:

(i) kertas siasatan berkaitan dana yang dikatakan berjumlah RM2.6 billion yang dimasukkan ke dalam akaun Najib Razak;

(ii) kertas siasatan berkaitan dakwaan salah guna kuasa oleh Najib Razak semasa mesyuarat Jemaah Menteri yang memberi kelulusan jaminan kepada wang pinjaman RM4 billion oleh syarikat SRC International daripada Kumpulan Wang Persaraan;

(iii) kertas siasatan berkaitan kemasukan sejumlah wang daripada akaun SRC International ke dalam beberapa akaun peribadi Najib Razak; dan

(b) Suatu perintah mandamus bahawa suatu suruhanjaya siasatan khas ditubuhkan untuk mengkaji, mempertimbang dan seterusnya menentukan tindakan lanjut yang sewajarnya terhadap hasil tiga kertas siasatan Suruhanjaya Pencegahan Rasuah yang dirujuk dalam perenggan 2(a), (b) dan (c) di atas.

(c) Kos permohonan ini dan kos sampingan baginya dibayar oleh Responden; dan

(d) Lain-lain relief yang difikirkan wajar dan adil oleh Mahkamah yang Mulia ini.

[5] The applicant, in essence submitted the following grounds in the statement required by O 53 r 3(2) of the Rules of Court 2012 to challenge the said decisions:

(a) the AG was in a position of conflict of interest to determine whether the Prime Minister had committed any offence as it was on the Prime Minister's advice that he was appointed as the AG. He also queried whether the AG's appointment as a director of Tabung Haji had anything to do with the said decisions;

(b) the decision in respect of the RM2.6 billion case in unreasonable as the AG:

(i) failed to consider that a prima facie case for an offence under s 3 read with ss 16 and 50 of the Malaysian Anti-Corruption Commission Act 2009 had been established based on the fact that the monies had been transferred to the Prime Minister's accounts;

(ii) took into account an irrelevant consideration the return of RM2.03 billion of the said monies which is a defense to be raised by the Prime Minister at the trial;

(iii) failed to consider that the request for mutual legal assistance was to verify that the monies came from the Saudi Royal Family and the

Saudi Treasury moreover part of the monies were returned to the said family;

(c) the AG by considering a defense to be raised by an accused and denying the request for mutual legal assistance had acted in excess of his jurisdiction under art 145(3) of the Federal Constitution;

(d) the decisions in respect of the two investigation papers concerning SRC International is unreasonable as the AG:

(i) failed to consider whether the approval given for the government guarantee on the RM4 billion loan was given in consideration of the monies transferred to the Prime Minister's personal accounts; and

(ii) considered possible defenses open to the Prime Minister which is not his function under art 145(3); and

(e) the AG's instructions to close the investigations papers:

(i) exceeded his jurisdiction under art 145(3); and

(ii) was unreasonable as the AG ought to have waited for the results of the investigations into 1MDB by the office of the Attorney General of Switzerland who had requested for mutual legal assistance in respect of its investigations.

WHETHER THE DECISION OF THE AG NOT TO INSTITUTE CRIMINAL PROCEEDINGS UNDER ART 145(3) IS NOT AMENABLE TO JUDICIAL REVIEW OR NOT-JUSTICIABLE

[6] The first point that i will deal with is the senior federal counsel's principal contention that the decision of the AG not to institute criminal proceedings under art 145(3) of the Federal Constitution is non-justiciable and hence is not reviewable by the court. As such, the learned senior federal counsel submitted that this application is an abuse of the court process and should be dismissed.

[7] Article 145(3) of the Federal Constitution provides as follows:

145 Attorney General

...

(3) The Attorney General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Syariah Court, a native court or a court-martial.

[8] I will begin with the Federal Court case of *Long bin Samat & Ors v Public Prosecutor* [1974] 2 MLJ 152 which held as follows:

(a) In our view, this clause (Article 145(3) from the supreme law clearly gives the *Attorney General very wide discretion over the control and direction of all criminal prosecutions. Not only may he institute and conduct any proceedings for an offence, he may also discontinue criminal proceedings that he has instituted, and the courts cannot compel him to institute any criminal proceedings which he does not wish to institute or to go on with any criminal proceedings which he has decided to discontinue*.

(b) *Anyone who is dissatisfied with the Attorney General's decision not to prosecute, or not to go on with a prosecution or his decision to prefer a charge for a less serious offence when there is evidence of a more serious offence which should be tried in a higher court, should seek his remedy elsewhere, but not in the courts*.

[9] In *Johnson Tan Han Seng v Public Prosecutor* [1977] 2 MLJ 66, the Federal Court was asked to determine whether the AG may discriminate between persons charged for the possession of firearms under different statutes carrying different sentences. The Federal Court followed the interpretation of art 145(3) in *Long bin Samat & Ors v Public Prosecutor* [1974] 2 MLJ 152 and further held that art 8(1) is to be read subject to art 145(3) in the following words:

(a) As s 376(i) of the Criminal Procedure Code was already in existence before Merdeka our constitution-makers could have been content with relying on it alone to preserve after Merdeka the Attorney-General's pre-Merdeka power, and if they had done so then it might be arguable that after Merdeka it must be read subject to art 8; but our constitution makers were not content to do so. *They deliberately wrote art 145(3) into our constitution … In view of the deliberate decision of our constitution-makers to write this provision into our constitution I do not think that it can be said that it must be read subject to art 8. Rather, in my view, the contrary: art 8 it is that must be read subject to art 145(3)*.

(b) *In deciding that the Attorney-General is not constrained by art 8 when deciding whether or not to prosecute and if so on what charge, whether a lesser or a greater one, it must not be thought that he may dishonestly. The public of whose interest he is the guardian has a right to expect him to act honestly, without fear of powerful national and local figures or of the consequences to him personally or politically, and without favoring his relatives and friends and supporters, his principal concern being to maintain the rule of law so that there will be no anarchy and to maintain standards in public life and the private sector; and if he did not do his duty honestly and properly the public would be able to show their disapproval not however in the courts but elsewhere and in the last resort by voting against the party of which he is a member.*

[10] The Privy Council in *Teh Cheng Poh v Public Prosecutor* [1979] 1 MLJ 50 upheld the interpretation of art 145(3) by the Federal Court in the

following words:

(a) It was contended on behalf of the appellant that the exercise of this discretion by the Attorney General deprived the appellant of his right under art 8(1) of the Constitution to equality before the law ... Their Lordships agree with the Federal Court in rejecting the contention. *Under the common law system of administration of criminal justice a prosecuting authority has a discretion whether to institute proceedings at all and, if so, with what offence to charge the accused. Such* a discretion is conferred upon *the Attorney General of Malaysia by Article 145(3) of the Constitution*.

(b) *There are many factors which a prosecuting authority may properly take into account in exercising its discretion as to whether to charge a person at all, or, where the information available to it discloses the ingredients of a greater as well as a lesser offence, as to whether to charge the accused with the greater or the lesser. The existence of those factors to which the prosecuting authority may properly have regard and the relative weight to be attached to each of them may vary enormously between one case and another. All that equality before the law requires, is that the cases of all potential defendants to criminal charges shall be given unbiased consideration by the prosecuting authority and that decisions whether or not to prosecute in a particular case for a particular offence should not be dictated by some irrelevant consideration*.

[11] I have carefully read the Privy Council decision in *Teh Cheng Poh*, and in my view the ratio decidendi of *Teh Cheng Poh* is that the AG by virtue of art 145(3) 'has a discretion whether to institute proceedings at all and, if so, with what offence to charge the accused' and as such art 145(3) was construed as being subject to art 145(3).

[12] The High Court in *Repco Holdings Bhd v Public Prosecutor* [1997] 3 MLJ 681 summed up the decisions of *Long bin Samat* and *Johnson Tan* as follows:

(a) The importance of the propositions formulated by the learned Lord President in these two cases is that, as a matter of *public law, the exercise of discretion by the Attorney General in the context of art 145(3) is put beyond judicial review. In other words, the exercise by the Attorney General of his discretion, in one way or another, under art 145(3), cannot be questioned in the courts by way of certiorari, declaration or other judicial review proceedings*.

(b) *I think that the proposition is not only good law but good policy. For, were it otherwise, upon each occasion that the Attorney General decides not to institute or conduct or discontinue a particular criminal proceeding, he will be called upon to a court of law the reasons for his decision. It will then be the court and not the Attorney General who will be exercising the power under art 145(3). That was surely not the intent on our founding fathers who framed our Constitution for us.*

[13] In *Public Prosecutor v Zainuddin & Anor* [1986] 2 MLJ 100, the

Supreme Court held that the AG's decision is not open to judicial review. The position was stated as follows:

(a) *The law and Constitution in giving the Attorney General an exclusive power respecting direction and control over criminal matters expect him to exercise it honestly and professionally. The law gives him a complete trust in that the exercise of this power is his and his alone and that his decision is not open to any judicial review*.

(b) *If he is a Minister of the Government he is answerable to Parliament and to his cabinet colleagues, and if he is not, the Government will answer for him in Parliament, whilst he himself will be answerable to the Government, and if he is a civil servant he will be answerable also to the Judicial and Legal Service Commission*.

[14] In *Karpal Singh & Anor v Public Prosecutor* [1991] 2 MLJ 544, the Supreme Court reiterated the law on art 145(3) as follows:

> *Unlike UK, the Constitution of the Federation which is a written law is specifically declared to be the supreme law of the land. For our immediate purpose we wish to refer to art 145(3) of the Constitution which states that. The discretion vested in the Attorney General is unfettered and cannot be challenged and substituted by that of the court's. The reasoning and logic behind such contention is well illustrated in the cases of Public Prosecutor v Lee Tin Bau* [1985] 1 MLJ 388, *Long bin Samat & Ors v Public Prosecutor* [1974] 2 MLJ 152, *Public Prosecutor v Datuk Harun bin Haji Idris and Ors* [1976] 2 MLJ 116 *and Poh Cho Ching v Public Prosecutor* [1982] 1 MLJ 86. *In the circumstances, it is superfluous to reiterate the same points*.

[15] In *Mohd Rafizi bin Ramli v Public Prosecutor* [2014] 3 MLJ 114, the Court of Appeal held that the courts ought to refrain from inquiring into the AG's exercise of discretion under art 145(3) following *Director of Public Prosecutions v Humphrys* [1976] 2 All ER 497 where it was said:

> *A judge must keep out of the arena. He should not have or appear to have any responsibility for the institution of a prosecution*. The functions of prosecutors and of judges must not be blurred. If a judge has power to decline to hear a case because he does not think it should be brought, then it soon may be thought that the cases he allows to proceed are cases brought with his consent or approval.

[16] Learned counsel for the applicant relied on the principles in *Pengarah Tanah Dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135 to support its contention that the exercise of discretionary power by the AG is amenable to judicial review.

[17] It must be emphasised that *Sri Lempah* is not decided by the apex court in the context of art 145(3) of the Federal Constitution. I agreed with learned senior federal counsel's argument that *Sri Lempah* has no bearing on the interpretation of art 145(3). In any event, cases such as *Zainuddin*, *Karpal*

Singh and *Repco* which are cases on art 145(3) were all decided after *Sri Lempah Enterprise*.

[18] It was also contended by the applicant that the Singapore case, *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR 239 is an authority for the proposition that based on *Teh Cheng Poh*'s case, the AG's discretions could be challenged if the first respondent had exercised his discretion unlawfully.

[19] Learned senior federal counsel in my view correctly argued that the case of *Phyllis Tan* expressed the position between the judicial power of the courts and the prosecutorial power of the AG, as follows:

> [144] Article 93 of the Federal Constitution provides that:
>
> The judicial power of Singapore shall be vested in a Supreme Court and in such subordinate courts as may be provided by any written law for the time being in force.
>
> But, separately, art 35(8) provides that: The Attorney General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for any offence.
>
> *These two provisions expressly separate the prosecutorial function from the judicial function, and give equal status to both functions. Hence, both organs have an equal status under the Constitution, and neither may interfere with each other's functions or intrude into the powers of the other, subject only to the constitutional power of the court to prevent the prosecutorial power from being exercised unconstitutionally*. Indeed, this is not even a true 'interference' in as much as the exercise of a function unconstitutionally is, in effect, not an exercise of that function at all and which it is therefore the duty of the court (pursuant to the constitution itself) to prevent.
>
> [145] *In relation to public prosecutions, art 35(8) makes it clear that the institution, conduct or discontinuance of any criminal proceedings is a matter for only the Attorney General to decide*. This means that, except for unconstitutionality, the Attorney-General has an unfettered discretion as to when and how he exercises his prosecutorial powers. *This also means that it is improper for the court to prevent the Attorney General from prosecuting an offender by staying the prosecution*.

[20] Learned counsel for the applicant also argued that commonwealth decisions show that a decision not to prosecute in those jurisdictions is subject to judicial review.

[21] In my view the common law principle in *Regina v Director of Public Prosecutions, ex parte C* [1995] 1 Cr App R 136 and *Regina v Director of Public Prosecutions, Ex parte Manning and another* [2001] QB 330 cited by the applicants do not apply in Malaysia as it is based on legislation the Code for Crown prosecutors which is peculiar to England. In the circumstances the said

common law cases are not relevant or applicable in the Malaysian context which is governed by art 145(3).

[22] It must be noted that the Federal Court in *Johnson Tan* case had also considered the Indian position and held as follows:

> The corresponding art 76 of the Indian constitution dealing with the Attorney General in India does not contain a similar provision, merely providing by clauses (2) and (3) that:
>
> (2) It shall be the duty of the Attorney General to give advice to the Government of India upon such legal matters, and to perform such other duties of a legal character, as may from time to time be referred or assigned to him by the President, and to discharge the functions conferred on him by or under this constitution or any other law for the time being in force.
>
> (3) In the performance of his duties the Attorney General shall have right of audience in all courts in the territory of India.

[23] It is pertinent to note that Indian decisions do not apply in Malaysia. There is no similar provision as our art 145(3).

[24] I have analysed the authorities submitted by both parties and in my view the effect and meaning of art 145(3) has been settled by long line of decisions of the apex courts. These courts have held that the decision of the AG to institute or not to institute criminal proceedings *is not justiciable or amenable to judicial review*.

[25] In *WRP Asia Pacific Sdn Bhd v Tenaga Nasional Bhd* [2012] 4 MLJ 296 the Federal Court reiterated as follows:

> Leave may be granted if the leave application is not thought of as frivolous, and if leave is granted, an arguable case in favor of granting the reliefs sought at the substantive hearing may be the resultant outcome. *A rider must be attached to the application though ie unless the matter for judicial review is amenable to judicial review no success may be envisaged.*

[26] It must be stressed that the AG is expected to act honestly and without fear and favor. However, the avenue of the person being unhappy with his decision is elsewhere and not to the court.

CONFLICT OF INTEREST

[27] Given my conclusion on the first issue, I deal with the second issue in less detail as the law is intertwined.

[28] Learned counsel for the applicant submitted that the respondent by being appointed as the 'Attorney General' by the Yang di-Pertuan Agong pursuant to the advice of the Prime Minister, the AG is in conflict of interest to decide whether to charge or not to charge the Prime Minister on the 1MDB and its related cases.

[29] I am unable to accept the applicant's submission on this point. Article 145(3) must always be borne in mind. I agree with learned senior federal counsel that art 145(3) of the Constitution is a special provision which give only the AG the power to institute, conduct or discontinue any proceeding for an offence (other than proceedings before a Syariah Court, a Native Court or a court martial).

[30] Article 145(3) gives the Attorney General very wide discretion over the control and direction of all criminal prosecutions. Not only may he institute and conduct any proceedings for an offence, he may also discontinue criminal proceedings that he has instituted, and the courts cannot compel him to institute any criminal proceedings which he does not wish to institute or to go on with any criminal proceedings which he has decided to discontinue (see *Long bin Samad*).

[31] Therefore, in my view the issue of conflict of interest as contended by the applicant does not arise when the AG in this case decided not to charge the Prime Minister.

MACC'S INVESTIGATION PAPERS

[32] The applicant contended that the decision of the AG directing the MACC to close its files upon the investigation into offences committed by the Prime Minister is ultra vires the AG's powers under art 145(3) of the Federal Constitution.

[33] On this issue, the AG filed an affidavit to exhibit the press statement which shows the words he used were as follows:

> Berdasarkan kepada keseluruhan fakta dan keterangan, saya sebagai Pendakwa Raya berpuasa hati bahawa tiada apa-apa kesalahan jenayah yang dilakukan oleh YAB PM berkait ketiga-tiga kertas siasatan. Pada hari ini, kertas-kertas siasatan yang berkaitan akan dikembalikan kepada pihak SPRM dengan arahan supaya ketiga-tiga kertas siasatan tersebut ditutup (NFA/KUS).

[34] The AG explained in his affidavit that the letters referring to NFA/KUS is an abbreviation for 'No Further Action' and 'Kemas Untuk Simpanan (tidy for keeping)' and is used as follows:

A Ini adalah arahan mengikut amalan biasa pihak pendakwaan yang diminitkan dalam kertas siasatan sekiranya tiada pendakwaan akan dibuat. Apa yang dimaksudkan dengan perkataan-perkataan 'kertas siasatan ditutup (NFA/KUS)' ialah fakta dan keterangan yang dikemukakan dalam kertas siasatan tidak menzahirkan wujudnya apa-apa kesalahan jenayah.

B

[35] The AG in his affidavit averred that the abbreviations were normal practice of minuting an investigation paper by the prosecutor when there is no prosecution.

C

[36] It was pointed out by learned senior federal counsel that the AG minute his instruction of 'No Further Action' after deciding that 'no offence committed by the Prime Minister' based on the existing facts and evidence in the investigation papers. The AG instructed the files to be closed since there was no further action to be taken as no offence was disclosed from the
D investigation papers. This is the usual practice adopted by the Attorney General's Chambers.

[37] I have carefully considered the provision of art 145(3) of the
E Constitution and in my view the instruction of NFA/KUS has nothing to do with the exercise of the AG's discretion under this article. It merely relates to the instructions commonly minute in the investigation papers after a decision not to prosecute is made as explained by learned senior federal counsel.

F

[38] It must be emphasised that the AG stated in his affidavit that the MACC is free to reopen the file and investigate on new evidence received:

Saya juga mendapati bahawa tiada keperluan bagi pihak SPRM menjalankan apa-apa lagi siasatan lanjut kerana saya berpuas hati bahawa siasatan yang telah
G dijalankan ini adalah cukup untuk saya membuat keputusan. Oleh yang demikian tiada tindakan lanjut perlu diambil dan kertas siasatan adalah untuk dikemaskan untuk simpanan. Walau bagaimanapun ini tidak bermakna pihak SPRM tidak boleh membuka semula kertas siasatan tersebut sekiranya terdapat fakta atau keterangan yang baru.

H

[39] I am of the view that the minute of NFA/KUS in the investigation papers does not impede the MACC to reopen investigations on new evidence. There is in fact no evidence adduced to show that the MACC has been impeded. There is no encroachment on the investigation powers of the MACC
I under the MACC Act.

[40] It must be stressed that pursuant to s 29 of the MACC Act the power to carry out, investigate and report anything relating to the commission of an offence is given by the Parliament to the commission.

[41] In this regard s 29(4) of the MACC Act provides as follows:

> (4) A report made under subsection (1) shall be kept secret and shall not be disclosed by any person to any person other than officers of the Commission and the Public Prosecutor until an accused person has been charged in court for an offence under this Act or any other written law in consequence of such report, unless the disclosure is made with the consent of the Public Prosecutor or an officer of the Commission of the rank of Commissioner and above.
>
> Subsection 29(4) envisages six situations whereby any report made to an officer of the SPRM relating to the commission of an offence under the SPRM Act under sub-s 29(1) can be disclosed to another person if they fall under any one of the six categories. They are as follows:
>
> (a) officers of the commission;
>
> (b) the public prosecutor;
>
> (c) when the accused person has been charged in court for an offence under the SPRM Act in consequence of such report;
>
> (d) when the accused person has been charged in court for an offence under any other written law in consequence of such report;
>
> (e) the disclosure is made with the consent of the public prosecutor; and
>
> (f) the disclosure is made with the consent of an officer of the commission of the rank of commissioner and above.

[42] On the scope of s 29 of the MACC Act, learned senior federal counsel has correctly stated the position of the law namely:

(a) every report on the commission of offences for which the MACC may investigated must be reduced to writing;

(b) if after perusing over such a report, an MACC officer finds that it raised a suspicion that an offence for which the said MACC officer may investigate, then he may initiate an investigation using all the powers under the MACC Act or the Police Act 1967; and

(c) that report and the resultant investigation is classified as SECRET unless:

(i) the suspect has been charged in a court of law or;

(ii) the public prosecutor declassified it as such or; and

(iii) an officer of the commission of the rank of commissioner and above, declassified it as such.

[43] It must be noted that the applicants is not challenging the validity of s 29 of the MACC Act particularly with regards to the status of the MACC papers which by operation of law is classified as secret and shall not be disclosed unless it falls under the six situations as stated by the Court of Appeal in the case

of *Mohd Zulhazi Mohd Zulkafli v Suruhanjaya Pasukan Polis Diraja Malaysia & Anor* [2015] 2 MLJ 88.

[44] In my view, the proviso to s 29(4) is not applicable to the facts of this present case. In *Zulkafli*'s case, the Court of Appeal held that the appellant who was charged with a disciplinary offence for accepting bribe from Alex, the appellant needed to have sight of the allegation made against him in order for him (the appellant) to prepare his defense.

[45] However, in this present case, the MACC papers which are the subject matter of the challenge, relate to the complaints against the Prime Minister and it is not against the applicant.

[46] Recently, the Federal Court in the case of *Suruhanjaya Sekuriti v Datuk Ishak bin Ismail* [2016] 1 MLJ 733 held that evidence of relevant facts becomes inadmissible when its reception offends, inter alia, a particular rule of law an example of which are privileged against disclosure. In this case, the relevant law is s 29(4) of the MACC Act.

[47] I have no doubt that the applicant has no knowledge whatsoever of the facts and evidence the MACC had placed before the AG. The evidence and material which the AG considered in arriving at his decision is therefore not before this court. Therefore, neither the court nor the applicant may have access to those MACC investigation papers.

[48] With respect in my view there is no merit in the applicant contention that the decision of the AG directing the MACC to close its files upon the investigation into offences committed by the Prime Minister is ultra vires the AG's powers under art 145(3) of the Federal Constitution.

[49] On this issue, it seems to me there is no purpose for this court to grant leave just for the purpose of investigation on full inter parte basis as there is no arguable case in respect of the applicant's application (*Tuan Hj Sarip Hamid & Anor v Patco Malaysia Bhd* [1995] 2 MLJ 442; [1995] 3 CLJ 627 and *Dr Michael Jeyakumar Devaraj v Peguam Negara Malaysia* [2013] 2 MLJ 321 followed).

THE REQUEST FOR MUTUAL LEGAL ASSISTANCE

[50] On this point, learned counsel for the applicant submitted that the only consideration by the AG in the exercise of his discretion under s 8(2) of the Mutual Assistance in Criminal Matters Act 2002 ('the MACMA') is simply whether he had reasonable grounds to believe that the request by MACC was

relevant to their ongoing investigations at the material time in respect of the purported donation. A

[51] In this regard, learned senior federal counsel for the applicant submitted that the AG refused MACC's request on the grounds that he had found that there was no criminal offence committed by the PM. B

[52] Therefore, it was submitted for the applicant that the AG has failed to apply the correct test in arriving at his decision to refuse MACC's request for mutual legal assistance. C

[53] It is necessary to refer to s 8(2) of the MACMA which reads as follows:

> The AG may, if he is satisfied that there are reasonable grounds for believing that anything would be relevant to a criminal matter request the appropriate authority of a foreign state — D
>
> (a) to assist in obtaining such thing; and
>
> (b) arrange for the thing to be sent to him.

[54] The AG stated in his press statement the reason why he refused the application: E

> Berhubung perkara ini juga, saya berpuas hati bahawa tiada keperluan bagi Malaysia untuk membuat permintaan bantuan bersama dalam perkara jenayah (mutual legal assistance) kepada mana-mana Negara asing bagi tujuan melengkapkan siasatan yang dijalankan oleh pihak SPRM memandangkan tidak terzahir apa-apa kesalahan jenayah berhubung sumbangan dana RM2.08 billion tersebut. F

[55] Based on the above statement, it is noted that the AG said that on the evidence of witnesses and supporting documents produced in the investigation papers there is no offence disclosed. G

[56] In the light of the Federal Court decision in *Empayar Canggih Sdn Bhd v Ketua Pengarah Bahagian Penguatkuasa Kementerian Perdagangan Dalam Negeri dan Hal Ehwal Pengguna* [2014] MLJU 1869 the AG's exercise of power under s 8(2) MACMA is in the course of a criminal investigation and hence not reviewable by the court. H

[57] Section 2 of the MACMA defined criminal matter in s 8(2) of the MACMA to mean a criminal investigation. I

[58] The Federal Court in *Empayar Canggih Sdn Bhd v Ketua Pengarah Bahagian Penguatkuasa Kementerian Perdagangan Dalam Negeri dan Hal Ehwal*

Pengguna held that:

> [24] ... *An exercise of power in the course of a criminal investigation is not open to review under O 53 RHC. To hold otherwise, would, to our mind, be exposing the criminal investigative process of all law enforcement agencies in the country to constant judicial review which surely could not have been the intention of Parliament* ... In this regard, we would approve the decision on similar point made by the Kuala Lumpur High Court in *City Growth Sdn Bhd & Anor v The Government of Malaysia* [2006] 1 MLJ 581 ... The crucial question for the determination of the court was whether the said orders of the DPP pursuant to s 50(1) of the AMLA was reviewable by way of judicial review. Raus J (as His Lordship then was) held:
>
> > [11] From the above, it can be seen that the deputy public prosecutor's order was in pursuant to s 50(1) of the AMLA. Section 50(1) of the AMLA is in the following words:
> >
> > > (1) Where the Public Prosecutor is satisfied on information given to him by an investigation officer that any movable property, including any monetary instrument or any accretion to it, which is the subject-matter of an offence under subsection 4(1) or evidence in relation to the commission of such offence, is in the possession, custody or control of a financial institution, he may, notwithstanding any other law or rule of law, after consultation with Bank Negara Malaysia, the Securities Commission or the Labuan Offshore Financial Services Authority, as the case may be, by order direct the financial institution not to part with, deal in, or otherwise dispose of such property or any part of it until the order is revoked or varied.
> >
> > [12] Looking at the order of the deputy public prosecutor as well as the provision of s 50(1) of the AMLA, I am of the view that the order of the deputy public prosecutor is not reviewable under O 53 of the RHC. To me, s 50(1) of the AMLA is part and parcel of the investigation process into an offence under s 4(1) of the AMLA. It appears that in order to facilitate the investigation into the offence of money laundering, the law has provided with the public prosecutor the power to assist the investigating officer. Clearly, s 50(1) of the AMLA was enacted to enable the public prosecutor or his Deputy to make an order of seizure of movable properties in the possession of the financial institutions by ordering the financial institutions not to part, deal in, or otherwise dispose of such property or any part of it until the order is revoked or varied.

THE ORDER OF MANDAMUS TO REQUIRE A ROYAL COMMISSION OF ENQUIRY BE FORMED

[59] Learned senior federal counsel submitted that the relief sought by the applicant for a mandamus order that a Royal Commission of Inquiry be formed and convened to inquire, deliberate, and thereafter to advise the appropriate actions to be taken on the MACC investigation papers, is not within the competent jurisdiction for this court, since such power to form the Royal Commission of Inquiry is vested only with the Yang di-Pertuan Agong, and not with the court.

[60] It is noted that under s 2 of the Commissions of Enquiry Act 1950, the Yang di-Pertuan Agong can set up a commission for the purposes provided in the said s 2 of the Commission Enquiry Act 1950 which states as follows:

> 2 Issue of Commissions
>
> (1) The Yang di-Pertuan Agong may, where it appears to him to be expedient so to do, issue a Commission appointing one or more Commissioners and authorizing the Commissioners to enquire into —
>
> (a) the conduct of any federal officer;
>
> (b) the conduct or management of any department of the public service of Malaysia;
>
> (c) the conduct or management of any public institution which is not solely maintained by State funds; or
>
> (d) any other matter in which an enquiry would, in the opinion of the Yang di-Pertuan Agong, be for the public welfare, not being —
>
> (i) a matter involving any question relating to the Islamic religion or the Malay custom; or
>
> (ii) in relation to Sabah or Sarawak, a matter specified in item 10 of the State List:
>
> Provided that where any federal officer into whose conduct it is proposed to enquire, was, at the time of committing such conduct, serving in a department of the public service of a State, such commission shall only be issued with the concurrence of the State Authority.

[61] I accept the submission of learned counsel for the applicant that the decision whether to exercise or not to exercise such discretion actually vests with the government, 'because His Majesty is a constitutional monarch and in this regard, he was required by Article 40(1) of the Constitution to: act in accordance with the advice of the Cabinet or of a Minister acting under the general authority of the Cabinet'.

[62] However the discretion to set up the Commission of Enquiry is exclusively within the sphere of the Executive. In the light of the principles cited by the Federal Court in *Dr Michael Jeyakumar Devaraj v Peguam Negara Malaysia* [2013] 2 MLJ 321, in my view, the setting up of a Commission of Enquiry involves a policy consideration by the Federal Government.

[63] The government policies emanate after consideration of a number of technical factors which are often non legal; and judges do not possess the necessary information and expertise to evaluate these non-legal factors and to pass judgment on the appropriateness or adequacy or a particular policy (*Dr Michael Jeyakumar Devaraj v Peguam Negara Malaysia* followed).

[64] Based on the above reasons, in my view, the relief and the subject matter presented by the applicants with regards to the setting up of a Royal Commission, in this case involves a policy consideration by the respondents and hence non-justiciable.

[65] The jurisprudence of the court is that it is not for the court to interfere in the matter because the wisdom and policy of the government belongs to the government. The court cannot tell the public authority how to exercise its powers (see *Government of Malaysia v Lim Kit Siang and another case* [1988] 2 MLJ 12; [1988] 1 CLJ 63).

CONCLUSION

[66] Based on the above reasons in my view, strong reasons exist for this court to dismiss the applicants' application at this preliminary stage without proceeding to the hearing of the substantive issue.

[67] As I have stated earlier there is no purpose for this court to grant leave just for the purpose of investigation on full inter parte basis as there is no arguable case in respect of the applicant's application (see *Tuan Hj Sarip Hamid & Anor v Patco Malaysia Bhd* [1995] 2 MLJ 442; [1995] 3 CLJ 627 and *Dr Michael Jeyakumar Devaraj v Peguam Negara Malaysia* [2013] 2 MLJ 321 followed).

[68] In the light of the above reasons, it is not necessary for me to consider the issue of the applicant's locus standi.

[69] Hence encl (1) is dismissed with no order as to costs.

Applicant's application dismissed with no order as to costs.

Reported by Dzulqarnain Ab Fatar